

NTSB Order No. EA-4188

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 27th day of May, 1994

Respondent.

violated sections 91.13(a) and 91.119(b) and (c) of the Federal Aviation Regulations (FAR), 14 CFR Part 91,² as a result of a low flight over a freeway which is alleged to have occurred while respondent was giving flight instruction.

Respondent raises three issues on appeal.³ He argues that the law judge's credibility findings should be reversed because they are based on what he claims is inherently incredible testimony. He further asserts that even if the credibility findings are adopted by the Board, the FAR section 91.119(b) violation, which was upheld based on evidence of allegations which respondent claims were not alleged in the complaint, should be dismissed as a matter of due process. Finally, respondent

²FAR §§ 91.13(a) and 91.119(b) and (c) provide as follows:

§ 91.13 Careless or reckless operation.

(a) Aircraft operations for the purpose of air navigation. No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

§ 91.119 Minimum safe altitudes: General.

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes.....

(b) Over congested areas. Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.

(c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

³The Administrator has filed a brief in reply, urging the Board to affirm the initial decision.

contends that the law judge erred in declining to waive sanction under the provisions of the Aviation Safety Reporting Program (ASRP).⁴ For the reasons that follow, we deny respondent's appeal.

On the day in question, two Los Angeles County deputy sheriffs were traveling in a patrol vehicle on Interstate 5 when they observed an aircraft operate directly over the freeway at a low altitude, for at least one-quarter of a mile. The deputy sheriff who was driving testified that he observed the aircraft make a quick descent and then travel at a level altitude along the center divider of the freeway. He testified that the aircraft passed over the patrol car at an altitude of 50-100 feet, basing this figure on his estimate that the aircraft's altitude was two and one half times the height of a forty-foot light pole. The deputy sheriff riding in the passenger seat testified that the aircraft operated over the freeway for at least 30 seconds, at an altitude of 75-100 feet. Both deputies testified that they were concerned because the aircraft appeared to be making an emergency landing, and also because it appeared to be landing in an area adjacent to a state prison, leading them to believe that the aircraft's operator could be part of a prison

⁴The ASRP provides that the timely filing of a report with the National Aeronautics and Space Administration (NASA) concerning an incident affecting aviation safety will, in certain instances, result in the waiver of sanction against the airman in any enforcement action which may arise out of such incident. FAA Advisory Circular 00-46C sets forth four criteria for the evaluation of waiver of penalty entitlement, including that the "violation was inadvertent and not deliberate." See Para. 9c.

escape.

Both deputies describe the traffic at the time of the low flight as moderate,⁵ with vehicles in each of several lanes, traveling at 55-65 mph.⁶ The aircraft was so low that the deputy sheriff who was driving was able to see a male pilot and he was able to read the aircraft's registration number to his partner.

Both deputies testified that the aircraft never landed. They observed it ascend, bank to the right, and depart the area to the east. The deputy sheriffs reported the incident to the Federal Aviation Administration (FAA). Respondent was subsequently identified as the pilot-in-command of the aircraft. He was giving flight instruction to a student pilot at the time of the operation.

Respondent and his student both deny operating at a low altitude over the freeway. According to the student, the aircraft was at an altitude of 4,500-5,000 feet when respondent pulled back the throttle so that the student could perform a simulated forced landing. The student saw a grassy area to his left and behind him, and he decided that it was a suitable landing site. He circled, aligned the aircraft, and approached to land. The student testified that he ignored everything to his left and right. He did not pay attention to the freeway because he was trying to focus on the center of the grassy area, where he

⁵The incident occurred on a Saturday.

⁶There are housing tracts to the west of the freeway. There is no evidence the aircraft operated over the housing area.

intended to land.⁷ This was his first unassisted forced simulated landing, and he admits to being very nervous.

Respondent testified that he paid close attention to where the aircraft was going and what the student was doing. He insists that the freeway was never in front of the aircraft, nor was it ever directly underneath them. According to respondent, other than crossing the freeway at a very high altitude, the aircraft did not operate over the freeway. In fact, respondent testified, the aircraft was too high when it crossed the freeway because the student overshot the landing site. Respondent explained that new student pilots are "very ground shy."

The FAA inspector who investigated this incident testified that respondent's allowing the aircraft to operate over the freeway at a low altitude was "inconsistent" with proper student instruction. In his opinion, it would have taken respondent no more than a few seconds to take control of the aircraft when his student went below altitude minimums. The Administrator took the position that sanction should not be waived under the ASRP.⁸ The law judge agreed, and affirmed the Administrator's order in its entirety.

Board precedent is clear that credibility determinations are generally within the exclusive province of the law judge and will

⁷According to respondent, the student aimed towards a tree which was at least 600 feet from the freeway.

⁸The Administrator's counsel stipulated to the fact that respondent filed a timely report under the provisions of the ASRP.

not be disturbed in the absence of arbitrariness, capriciousness, or some other compelling reason. Administrator v. Smith, 5 NTSB 1560, 1563 (1986). Respondent argues that the testimony of the two deputy sheriffs is "inherently incredible" because it was not corroborated by reports of complaining motorists. Although such evidence might have strengthened the Administrator's case, its absence does not, in our view, create doubt as to the witnesses' version of the events. As the law judge noted, these deputy sheriffs had no reason to fabricate the allegations. Moreover, the law judge heard and saw all of the witnesses and was in a position to judge their demeanor. Respondent offers us no persuasive reason to reverse the law judge's credibility findings.

Respondent argues that even assuming the deputy sheriffs' testimony is credible, the evidence still fails to support the finding that the aircraft was operated over a congested area. We disagree. Respondent notes that the complaint alleged that there was heavy traffic over Interstate 5 at the time of the low flight, but that the law judge concluded that there was moderate traffic. In the Board's view, even if Interstate 5, a major California freeway, is not "bumper to bumper" on a late Saturday afternoon, moderate traffic in every lane still renders it "congested," for purposes of the regulation. See also Administrator v. Dutton, NTSB Order No. EA-3204 (1990) (Moderate traffic on a highway at 12:55 p.m. is a congested area for

purposes of the minimum safe altitude regulation).⁹ We adopt the law judge's findings as our own.

Finally, we are not persuaded that respondent's conduct was such that he should be able to benefit from the ASRP. Respondent's decision to permit the continuation of his student's simulated forced landing such that there was a significant low overflight cannot be considered inadvertent. The law judge accepted as established that this flight at 100 feet or less above the freeway continued for one-quarter mile.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's order and the initial decision are affirmed; and
3. The 90-day suspension of respondent's commercial pilot certificate shall begin 30 days from the date of the service of this order.¹⁰

VOGT, Chairman, HALL, Vice Chairman, LAUBER and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁹There was also evidence that the aircraft was operated horizontally within 2,000 feet of a housing area. We reject respondent's contention that he was not put on sufficient notice to defend against this charge. The complaint alleged a violation of FAR § 91.119(b), which prohibits low flight over a "city, town, or settlement." We think this language includes housing areas adjacent to the freeway.

¹⁰For purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).